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JUN 24 1963
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No. [redacted] 177

IN THE

Supreme Court of the United States

October Term, 1962

ABRAHAM TEITELBAUM,
Petitioner,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BLOOMINGDALE AND HENDERSON, INC., CHICAGO

IN THE

Supreme Court of The United States

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No. 1143

ABRAHAM TEITELBAUM,
Petitioner,

vs.

THE CURTIS PUBLISHING COMPANY, a Corporation,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner, Abraham Teitelbaum, has sued the Curtis Publishing Company for libel, basing his complaint on an article in the Saturday Evening Post which described him as a hoodlum and a distinguished thug. Respondent admitted publication, but alleged, *inter alia,* the defenses of truth, fair comment on matters of public interest, and qualified privilege for materials taken from the report of a government agency.[1] Respondent also defended on the ground that petitioner did not have a good reputation and

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[1] The author of the article testified that he had based his characterization of petitioner on the report of an agency of the State of California, known as the Special Crime Study Commission on Organized Crime (R. 564-66). That reported petitioner as one of "'the more important nationally-known hoodlums who in the past two years have expanded their activities to explore the financial opportunities offered in California'" (R. 675).

therefore could not have been damaged by respondent's publication. Federal jurisdiction rests on diversity of citizenship.

The jury returned a verdict of not guilty. The Court of Appeals affirmed on the ground that petitioner had not complied with the Court of Appeals' Rule 16(b), requiring the appellant to set forth in the appendix to his brief those parts of the record upon which errors are assigned, that is, the parts which are necessary "fairly to present the issues on appeal." See Appendix A to petition for certiorari, p. 19.

On the merits, this case turns on the Illinois law of libel and presents no question of importance for this Court to decide.

With respect to the inadequacy of his appendix on appeal, petitioner's position has been that because the record contains no admissible or "proper" evidence supporting the jury's verdict, he need not include any of the evidence in his appendix in the Court of Appeals. But Rule 16(b) provides that:

> "• • • If appellant or petitioner raises a question of the sufficiency of the evidence to support a finding, ruling, order, verdict or judgment, he shall include in the appendix all evidence pertinent thereto."

The petitioner here argues (petition, p. 10) that the burden of proof is upon the defendant in a libel case to prove truth and other affirmative defenses, and that, therefore, it was defendant's duty to print the record in the Court of Appeals. But wherever the burden of proof may be in the trial court, it is the appellant's duty to comply with the rules of the appellate court with respect to the preparation of a proper appendix or record.

Nor was the inadequacy of the appendix cured by the memorandum filed *after* the oral argument in which petitioner listed excerpts from the transcript in which he objected to the admission of various exhibits introduced by defendant. (See petition, Appendix B, pp. 24-9.) Apart from its tardiness, the memorandum was plainly not sufficient to satisfy Rule 16(b). The excerpts quoted were too brief to show the nature of the exhibits or the issues presented for review.

In any event, the newspaper clippings complained of were not offered to prove the truth of the matters stated therein, but as evidence that the damage to petitioner's reputation was caused by prior publications and that petitioner accordingly had not been damaged by respondent's article. On this point the District Court merely followed the decision of the Seventh Circuit in *Hartmann* v. *American News Co.*, 171 F. 2d 581, 585-86 (7th Cir. 1948), certiorari denied, 337 U.S. 907 (1949). The Court of Appeals there said:

> "• • • The law is clear that a defendant is liable only for the damages which he has caused, and he is not liable for the injury done by others. Newell, Slander and Libel, § 780 (4th Ed.). In his instructions to the jury the judge told the jury in regard to the report and newspaper articles admitted in evidence if it awarded any damages it could consider whether the damage flowed from the articles complained of, or from other publicity. Thus it appears that the court did confine the evidence to its proper category • • •." (p. 585).

The *Hartmann* case instructions on newspaper articles were given in this case (R. 803-4). The point is no more appropriate for certiorari now than it was in the *Hartmann* case.

Petitioner's assertion (petition, p. 4) that Instruction K required the jury to find "if it determines the issues in

favor of the plaintiff, that it shall assess plaintiff's compensatory damages at one dollar" grossly distorts an unexceptionable instruction. This is what the instruction said (R. 802-3):

> "If you find that the plaintiff in this case is entitled to recover compensatory damages for the injury he has sustained, if any, then your duty in such circumstance is to determine the actual damages sustained by the plaintiff, if any, by consideration of all of the evidence with respect thereto.
>
> "'If you find from the greater weight of all of the evidence that the plaintiff has sustained no actual damages, then your verdict for compensatory damages for the plaintiff should be in the amount of $1.00."

A separate instruction in the form prepared by the plaintiff was given with respect to punitive damages (R. 805). An instruction substantially similar to Instruction K was approved in *Van Norman* v. *Peoria Journal Star, Inc.*, 31 Ill. App. 2d 314, 329, 175 N.E. 2d 805, 811 (1961).

Petitioner contends that he had a right "as a litigant" (petition, p. 14) to divide the closing argument to the jury between his attorney and himself. But he was represented by counsel, did not appear *pro se*, and did not make his request to participate until immediately prior to the commencement of the argument. The trial court is not required to allow a party represented by counsel of his own choice also to act as his own counsel. See *Brasier* v. *Jeary*, 256 F. 2d 474 (8th Cir. 1958), certiorari denied, 358 U.S. 867 (1958), which reviews the authorities; *Egan* v. *Teets*, 251 F. 2d 571, 578-79 (9th Cir. 1957); *Shelton* v. *United States*, 205 F. 2d 806, 812-13 (5th Cir. 1953); *United States* v. *Foster*, 9 F.R.D. 367, 371-73 (S.D.N.Y. 1949) (Medina, J.); and 28 U.S.C. § 1654, which provides that parties may plead and conduct their own cases personally *or* by counsel.

The other points raised in the petition for certiorari are also plainly without substance and present no question for this Court to review. The petition for certiorari should be denied.

Respectfully submitted,

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